

### **REMARKS**

The Applicant submits its first response After Final. By this response, claims 21-41 are pending. Claims 21, 28, 32 and 37 are independent. Compared to prior versions, all claims remain as previously or originally presented. Claims 1-20 remain canceled. The Examiner rejects claims 21 and 41 under 35 U.S.C. §101. She rejects claims 21-25, 26-29 and 31-41 as being obviously unpatentable over U.S. Patent No. 5,758,343 to Vigil in view of U.S. Patent Publication No. 2002/0032775 to Venkataramaiah et al. (hereafter, "VENKA," to use the Examiner's nomenclature). Claims 26 and 30 are rejected as obvious in view of the Vigil and VENKA combination, in further view of U.S. Patent Publication No. 2006/0129652 to Petrovskaya.

The Applicant presents Provisional Application No. 60/228,597 as Exhibit A. The Applicant notes that VENKA makes a claim for the benefit of the August 28, 2000 filing date of Provisional Application No. 60/228,597. However, Provisional Application No. 60/228,597 does not disclose the teachings of VENKA on which the Examiner relies in making her rejections. Namely, the Examiner refers extensively to Figure 1 of VENKA, and relies heavily on its teaching, but such is nowhere found in the materials comprising the provisional application. Therefore, it is submitted that VENKA is not entitled to the filing date of Provisional Application No. 60/228,597, but only a filing date of August 28, 2001. Nonetheless, if the Examiner has knowledge of any other evidence that might support a filing date earlier than August 28, 2001 for VENKA, the Applicant respectfully requests a copy of such evidence.

As explained in *Ex parte Messerges*, if a 102(e) reference claims priority to an earlier filed provisional application, the filing date to which the reference is entitled for the subject matter on which the Examiner relies, must be determined. *Order Remanding to the Examiner, Ex parte Messerges, Appeal 2007-1662, p. 3-4* (B.P.A.I. November 20,

2007)(The Board remanded to the Examiner a determination of whether Sweet, U.S. Publication No. 2002/0031230 A1, was entitled to its provisional filing date in Provisional Application Ser. No. 60/225,7096 since the Provisional appeared void of any support of the subject matter relied on by the Examiner in fashioning the claim rejections.) Also, the remand required determining whether the Provisional application provided support rising to the level of the written description requirement of 35 U.S.C. §112, first paragraph. *Id.* ***Therefore, not only does the Applicant's request consist of the Examiner providing evidence in support of a filing date earlier than August 28, 2001 for VENKA, but further includes a request for substantiation (to the extent evidence exists or the Examiner decides to offer evidence) sufficient to meet the strictures of the written description requirement of 35 U.S.C. §112, first paragraph.*** As made clear in *Ex parte Messerges*, it is "[o]nly after such a determination will the Examiner be in a position to reject the claims" based on the filing date of the Provisional application. *Id.*

In the event, however, the filing date of August 28, 2001 is the earliest filing date to which VENKA is entitled, the Applicant points out that it only precedes the filing date of the present invention by three days. In turn, the Applicant anticipates coming forth with proof of conception and reduction to practice of the present invention at least before August 28, 2001, thereby antedating VENKA. To the extent the Applicant needs to present its evidence after issuance of the expected Advisory Action, but still within the time set by the final rejection, the "good and sufficient reasons" for not earlier presenting evidence under 37 C.F.R. §116(e) relates to the fact that the Board's order in *Ex parte Messerges* was not decided until November 20, 2007. *See Order Remanding to the Examiner, Ex parte Messerges, Appeal 2007-1662* (B.P.A.I. November 20, 2007). As the Examiner will recall, the Applicant's most recent correspondence, before this paper, was submitted on November 19, 2007. In other words, the Applicant's immediately prior response was one day before the

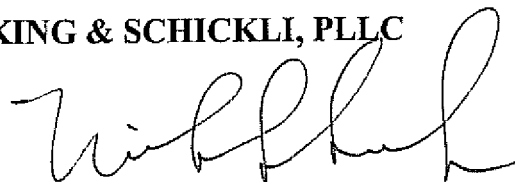
Board made clear that the Examiner must provide evidence of the application filing date (when assessing a 102(e) reference claiming priority to an earlier-filed provisional application) and was unable to make its request and present evidence earlier.

Ultimately, if VENKA fails as a reference, the rejections of claims 21-25, 26-29 and 31-41 as being obviously unpatentable over Vigil in view of VENKA must be reversed. Similarly, the rejections of claims 26 and 30 as being obviously unpatentable over the Vigil and VENKA combination, in further view of Petrovskaya must be reversed. In turn, all outstanding rejections will be rendered infirm.

If any other matters require attention, please have the Examiner contact the Applicant's attorney at the below-listed telephone number. *If any additional fees are due, although none are believed due, the undersigned authorizes their deduction from Deposit Account No. 11-0978.*

Respectfully submitted,

**KING & SCHICKLI, PLLC**



Michael T. Sanderson  
Reg. No. 43,082

247 North Broadway  
Lexington, KY 40507  
(859) 252-0889  
(859) 252-077